EPA-PNL-1572

Jeff Frithsen/DC/USEPA/US
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To Phil North
cc Jenny Thomas
bcc
Subject BBA: Public Comment Technical Review - 3787 Center for Water Advocacy

Phil:

Thanks for agreeing to review and summarize technical comments submitted to the Bristol Bay Assessment Docket.

Attached is an entry for your review. Also attached is a form to get you started., but see my previous email from yesterday for guidelines.

Thanks.

Jeff

Center for Water Advocacy 3987DRAFT.pdf

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July 23, 2012

Office of Environmental Information (OEI) Docket (Mail Code: 2822T)
Docket # EPA-HQ-ORD-2012-0276
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: **Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska**

Dear OEI:

Thank you for the opportunity to Comment on the Environmental Protection Agency's Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska (Assessment). The Center for Water Advocacy (CWA) is a non-profit public interest organization which strives to promote the long-term sustainability of water resources in Alaska for the benefit of fish and wildlife populations, habitat, aesthetics, recreation, and traditional and cultural activities, using the principles of democracy, environmental justice, and sound ecology as our guide.

I. Ecological Resources

According to the Assessment, the "Bristol Bay watershed provides habitat for numerous animal species, including 35 fishes, more than 190 birds, and more than 40 terrestrial mammals. Many of these species are essential to the structure and function of the region's ecosystems and economies. Chief among these resources is a world class commercial and sport fishery for Pacific salmon and other important resident fishes." Assessment Exec. Summ. At 5. In fact, the "Bristol Bay watershed supports the largest sockeye salmon fishery in the world, with approximately 46% of the average global abundance of wild sockeye salmon. Between 1990 and 2010, the annual average inshore run of sockeye salmon in Bristol Bay was approximately 37.5 million fish." *Id*.

The fact that the proposed Pebble Mine (Mine) would significantly impact the unique fishery resources of the Watershed is illustrated by the fact that " unlike most terrestrial ecosystems, the Bristol Bay watershed has undergone little development and remains largely intact", *Id.* at 6-7. According to the Assessment the relatively:

> low watershed elevations (especially in the extensive Nushagak-Bristol Bay Lowland region) and the absence of artificial barriers to migration (e.g., dams and roads…) mean that not only are streams, lakes and other aquatic habitats abundant in the Bristol Bay region, they tend to be accessible. With exception of Chikuminuk Lake, all major lakes within the watershed are accessible to anadromous salmon…Lakes and ponds also play a key role in groundwater dynamics and flow stability….

Assessment at 2-20.

The most important factor for which the "exceptional quality of the Bristol Bay watershed's fish populations [therefore], can be attributed to" is "the watershed's high-quality, diverse aquatic habitats, *which are untouched by human-engineered structures and flow management controls*." *Id.* at 6. (emphasis added) In addition, that the "condition of terrestrial ecosystems in Bristol Bay… is intimately linked to the condition of salmon populations." *Id.*, is illustrated by the fact that:

> this high diversity of habitats…has enabled the development of high genetic diversity of fish populations. This genetic diversity acts to reduce year to- year variability in total production and increases the stability of the fishery. The return of salmon from the Pacific Ocean brings nutrients into the watershed and fuels terrestrial and aquatic food webs.

Id.

II. Ground and Surface Flows

That the Mine will negatively impact the unique surface and ground water flow resources of the Bristol Bay Watershed, is illustrated by the fact that:

> Surface and subsurface waters are highly connected, enabling hydrologic and biochemical connectivity between wetlands, ponds, streams, and rivers, thus increasing the diversity and stability of habitats able to support fish. The high diversity of habitats, high quality of surface and subsurface waters, and relatively low development pressures all contribute to making Bristol Bay a highly productive system.

Assessment ES at 6.

In fact, groundwater exchange is critical to the region's aquatic habitats and because:

> salmon rely on clean, cold water flowing over and through porous gravels for spawning, egg incubation, and rearing (Bjornn and Reiser 1991), areas of groundwater upwelling create high-quality salmon habitat …. For

> example, densities of beach spawning sockeye salmon in the Wood River watershed were highest at sites with strong groundwater upwelling, and zero at sites with no upwelling (Burgner 1991). Densities of salmon-supporting streams tend to be lower in regions with lower permeability and less extensive exchange between groundwater and surface water (Johnson and Blanche 2011, ADFG 2012).

Assessment at 2-21.

The intricit connection between groundwater and surface water in the Watershed "helps to moderate water temperatures and streamflows. For example, groundwater contributions that maintain water temperatures above 0^0C are critical for maintaining winter refugia in streams that might otherwise freeze (Power et al. 1999)." *Id.*

Further, that the nature of mining activity, in particular, will disrupt the hydrological connection between grant and surface waters and negatively impact surface water is illustrated by the fact that:

> These groundwater contributions to streamflow also support flows in the region's streams and rivers that are more stable than those typically observed in many other salmon streams (e.g., in the Pacific Northwest or southeastern Alaska). The lower mainstem Nushagak and Kvichak Rivers illustrate this tendency toward moderated, consistent streamflows…. Coarse-textured glacial drift in the Kaskanek and Upper Talarik Creek drainages promotes high groundwater contributions to these streams, resulting in stable flows through much of the year…. High baseflows in the Nushagak River also are consistent with increased interactions between surface water and groundwater, as water flows from the Southern Alaska Range, Ahklun Mountains, and Nushagak-Big River Hills into the coarse-textured glacial drift of Nushagak-Bristol Bay Lowlands ….

Id.

Finally:

> Streamflow storage in upstream lakes plays a role in flow stabilization, as well. In the Kvichak watershed, Iliamna Lake dampens high flows from the Iliamna and Newhalen Rivers before they reach the mainstem. The effect of upstream lakes on flow storage is also evident in the Newhalen River, located downstream of Lake Clark…. In the Nushagak watershed, large lakes occur in the Ahklun Mountain headwaters, and their moderating influence can be seen in the Nuyakuk River.

Id. at 21-22

III. Indigenous Cultures

The EPA defines "environmental justice" as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA Draft Plan 2014, p. 3 (September 2011). Such disproportionate impacts of the Mine on the Native Alaskan Cultures located in the Bristal Bay area are illustrated by the fact that the:

> Alaska Native cultures present in the Nushagak River and Kvichak River watersheds—the Yup'ik and Dena'ina — are two of the last intact, sustainable salmon-based cultures in the world. In contrast, other Pacific Northwest salmon based cultures are severely threatened due to development, degraded natural resources, and declining salmon resources. Pacific salmon are no longer found in 40% of their historical breeding ranges in the western United States, and
> where populations remain, they tend to be significantly reduced or dominated by hatchery fish. Salmon are integral to the entire way of life in these cultures as subsistence food and as the foundation for their language, spirituality, and social structure. The cultures have a strong connection to the landscape and its resources. In the Bristol Bay watershed, this connection has been maintained for at least the past 4,000 years and is in part due to and responsible for the continued pristine condition of the region's landscape and biological resources.

Assessment, Exec. Summ. At 7.

Additionally, the EPA must consider environmental justice (EJ) concerns when making Section 404(c) decisions. Pursuant to, the EPA "shall make achieving environmental justice part of its mission by identifying and addressing as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Executive Order 12,898 at 67 (quoting Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994)). Based on the fact therefore, that, under Executive Order 12898, which mandates "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" and the Civil Rights Act of 1968, the EPA is required to take any action necessary to prevent the negative impacts on the subsistence resources relied upon by the Yup'ik and Dena'ina communities.

> Indeed, this:
>
> subsistence-based way of life is a key element of indigenous identity and it serves a wide range of economic, social, and cultural functions in Yup'ik and Dena'ina societies…[t]he significant impact of the Mine on Indigineous Cultures who on salmon and other resources in the Bristol Bay ares for subsistence needs, is illustrated by the fact that "The respect

> and importance given salmon and other wildlife, along with the traditional knowledge of the environment, have produced a sustainable subsistence-based economy."

Id. at 7-8.

IV. Overall Risks to Salmon and Other Fish

According to the Assessment, based "on the mine scenario, the assessment defines potential mining related stressors that could affect the Bristol Bay watershed's fish and would consequently have impacts on wildlife and human welfare. Assessment Exec. Summ. at 12.

a) No Failure

Even under the "no failure, or routine operation", mode of operation of the Mine which means that "adverse effects outside the mine footprint are minimized by complete containment of waste rock and mine tailings, reliable collection of all water from the site, and effective treatment of effluents…,impacts on fish resulting from habitat loss and modification within and beyond the area of mining activity would result from six key direct and indirect mechanisms." *Id.* at 12-13. Specifically, such impacts include:

> **(1) Eliminated or blocked streams.** Under the minimum and maximum mine
> footprints (i.e., the mine pit, waste rock piles, and tailings storage facilities) would result in the loss of 87.5 to 141.4 km (55 to 87 miles), respectively, of possible spawning or rearing habitats for coho salmon, Chinook salmon, sockeye salmon, rainbow trout, and Dolly Varden.
>
> **(2) Reduced flow** resulting from water retention for use in mine operations, ore processing,transport, and other processes would reduce the amount and quality of fish habitat. Reductions in streamflow exceeding 20% would adversely affect habitat in an additional 2 to 10 km (1.2 to 6.2 miles) of streams, reducing production of coho salmon, sockeye salmon, Chinook salmon, rainbow trout, and Dolly Varden. An unquantifiable area of riparian floodplain wetland habitat would either be lost or suffer substantial changes in hydrologic connectivity with streams due to reduced flow from the mine footprint.
>
> **(3) Removal of 10.2 to 17.3 km2 (2,512 to 4,286 acres) of wetlands** in the footprint of the mine would eliminate off-channel habitat for salmon and other fishes. Wetland loss would reduce availability and access to hydraulically and **t**hermally diverse habitats that can provide enhanced foraging opportunities and important rearing habitats for juvenile salmon

> **(4) Indirect effects of stream and wetland removal** [such as reduced food resources; shifting balance of surface water and groundwater inputs to downstream reaches; water treatment and reduced passage through groundwater flowpaths], would include reductions in the quality of downstream habitat for the same species listed above in the three headwater streams draining the mine site.

Id. at 13-14.

b) Failure

The impacts of a Failure of the dam at TSF 1 which would involve the release of a flood of tailings slurry into the North Fork Koktuli River, scouring the valley and depositing tailings several meters (yards) in depth over the entire floodplain of the river would result in even more devastating impacts to fishery and subsistence resources. This would include the:

> complete loss of suitable salmon habitat in the North Fork Koktuli River along at least 30 km (18.6 miles) of stream habitat—the spatial limit of the modeling conducted for this assessment—in the short term (fewer than 10 years) and the high likelihood of very low-quality spawning and rearing habitat in the long term (decades) would result in near complete loss of mainstem North Fork Koktuli River fish populations.

Id. at 17-18. In addition, "[n]ear-complete loss of North Fork Koktuli River fish populations would likely result from these habitat losses. *Id.* at 19.

V. Cumulative Risks

According to the Assessment:

> the potential exists for development of multiple mines and associated infrastructure in these watersheds. Each potential mine poses risks similar to those identified for the mine scenario. Estimates of the loss of stream and wetland habitats would differ across different deposits based on the size and location of mining operations within the watersheds. Individually, each mine footprint would eliminate some amount of fish-supporting habitat and, should human or engineering failures occur, affect fish habitats beyond the mine footprint. Cumulatively, multiple mines have the potential to decrease the abundance and genetic diversity of fish populations and thereby increase their annual variability.

Id. at 24.

VI. Section 404(c) of the Clean Water Act

Section 404 of the CWA extends the regulatory jurisdiction of the EPA and the Army Corps over navigable waters, 33 U.S.C. § 1344(a) (2006), which includes wetlands, tidal waters, and fresh waters. U.S. ARMY CORPS OF ENG'RS, REGULATORY JURISDICTION OVERVIEW 2–3, *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_juris_ov.pdf. More specifically, agency regulations have interpreted navigable waters as "waters of the United States," encompassing tributaries, Marjorie A. Shields, Annotation, *What are "Navigable Waters" Subject to Federal Water Pollution Control Act*, 160 A.L.R. FED. 585 (2000), "rivers, streams . . . [or] 'wetlands,' " that could be used for recreation by interstate or foreign travelers, or to harvest fish or shellfish for interstate or international commerce. 40 C.F.R. § 122.2 (2010).

The Pebble deposit falls within the Army Corps and the EPA jurisdictions under Section 404 because development of the prospect would require discharge of dredged or fill material into waters of the United States. This is because development of the mine would likely require stream diversion channels, about nine linear miles of dams and embankments, and other activities necessary for the development of open pit and underground mining, including dewatering the mines by pumping and relocating groundwater. Assessment Exec. Summ. At 10-12. The mine will impact rivers and creeks that meet the jurisdictional definition of navigable waters.

The EPA should initiate public process under Section 404(c) of the CWA as the six federally recognized tribes have urged. *See* Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, at 6–8. The tribal petition has been endorsed and echoed by various interest groups who have sent letters to the EPA urging the agency to initiate the Section 404(c) process. These groups include the Alaska Independent Fishermen's Marketing Association, Alaska Wilderness Recreation & Tourism Ass'n, *AWRTA Urges EPA to "Veto" Pebble Mine*, VISIT WILD ALASKA (Jan. 11, 2011), http://www.visitwildalaska.com/whats_new/?m=20110.
the Alaska Wilderness Recreation & Tourism Association, Alaska Wilderness Recreation & Tourism Ass'n, *AWRTA Urges EPA to "Veto" Pebble Mine*, VISIT WILD ALASKA (Jan. 11, 2011), http://www.visitwildalaska.com/whats_new/?m=20110, and 363 sporting conservation groups, businesses, and trade associations. Letter from 363 Sporting Conservation Groups, Businesses, and Trade Associations to EPA (Feb. 24, 2011), *available at* http://www.nationalparkstraveler.com/files/Sportsmen-Bristol%20Bay.pdf.
Although the EPA is conducting a scientific assessment of the Bristol Bay watershed, the EPA emphasized that its decision to assess the watershed was not a regulatory determination: the agency has yet to decide whether it will initiate public process under Section 404(c). *See* Press Release, U.S. Envtl. Prot. Agency, *supra* note 16.

VI. Past Agency Actions: Use of Section 404(c) in Other Contexts

The validity of Section 404(c) process for the Pebble prospect can be bolstered by contrast and analogy to past agency actions. Additionally, analysis of similar agency precedent can assuage lawmakers who fear that Section 404(c) process at the Pebble prospect would be unprecedented. *See, e.g.*, Letter from Lisa Murkowski, U.S. Senator, to Lisa P. Jackson, U.S. EPA Adm'r 2 (Feb. 16, 2011), *available at* http://murkowski.senate.gov/public/?a=Files.Serve&File_id=53976c39-0bc5-44e9-a6ab-ab56a970b56e. Because the Section 404(c) process at Pebble would be in line with past agency action, it would conform to President Obama's Executive Order 13,563, in which the President emphasized that the regulatory system must protect the environment and other national interests while "promot[ing] predictability and reduc[ing] uncertainty." Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

Past action by the Army Corps illustrates its broad discretion in issuing permits and demonstrates that the process under Section 404(c) may be essential to ensure the CWA's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). The Army Corps has a history of approving permits in the face of severe environmental harm, and courts have a similar history of upholding these permits under the highly deferential arbitrary and capricious standard of review. *See, e.g.*, Kentuckians for Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 448 (4th Cir. 2003); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2480 (2009) (Ginsburg, J., dissenting). The past Army Corps actions demonstrate the general importance of the Section 404(c) process.

Past EPA actions outline the circumstances and factors that have required public process under Section 404(c). The EPA has prohibited dredging and filling under Section 404(c) thirteen times, *Factsheet: Clean Water Act Section 404(c): "Veto Authority"*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf (last visited Apr. 1, 2011), and is currently in the midst of the administrative process for one other case. *Id.*; *Clean Water Act Section 404(c): "Veto Authority"*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c_index.cfm (last visited Mar. 9, 2012). The EPA has only twice exercised its Section 404(c) authority *after* the Army Corps issued a permit to discharge dredge and fill material. SPRUCE NO. 1 MINE FINAL DETERMINATION at 99. Although the implementing regulations for Section 404(c) allow retroactive prohibitions by withdrawing specification of a disposal site post-permitting, the EPA "strongly prefers to initiate the § 404(c) process prior to issuance of a permit." *Id.* at 45.

VII. Legal Authority, Past Agency Actions, and Policy Applied to Pebble

Statutory and regulatory authority, judicial precedent, past agency actions, and sound policy considerations all support the EPA initiating Section 404(c) process and justify prohibiting dredge and fill permits for the proposed Pebble Mine. The EPA should

initiate Section 404(c) process immediately, prior to the issuance of dredging discharge permits and prior to the submission of mine plans by the PLP. In this way, the EPA can guarantee efficient communication with the area's stakeholders and can move forward with environmental protection at the forefront of the decision-making process. If the EPA withholds Section 404(c) process pending the Army Corps issuing permits, then the agency should look to its recent Section 404(c) determinations, *See* SPRUCE NO. 1 MINE RECOMMENDED DETERMINATION, to support initiating Section 404(c) after permitting. If the EPA refuses to exercise its Section 404(c) authority altogether, its decision may constitute an abuse of agency discretion and an abdication of a duty of oversight.

A. Statutory and Regulatory Authority Alone Support Section 404(c) Process at Pebble

As outlined above, the proposed development of the Pebble prospect will fall within the permitting jurisdiction of the Army Corps under Section 404 and will therefore be subject to the EPA's authority under Section 404(c). *See* 40 C.F.R. § 231.1 (2010). Second, statutory and regulatory authorities support the EPA in initiating public process under Section 404(c). The regulations implementing Section 404(c) enable the EPA Administrator to "prohibit or otherwise restrict a site" if there will be an "unacceptable adverse effect" to fishery areas, including spawning and breeding areas, recreational areas, or wildlife. *Id.* The interests that the regulations protect are all present in the Bristol Bay Region. The fishery and recreational areas would be uniquely threatened by acidic and toxic runoff created by the development of the sulfidic ore body. *See* EISLER, *supra* note 53; Kempton at 559.

The implementing regulations of Section 404(c) call for a proactive and precautionary approach to overseeing the protection of aquatic environments from unacceptable adverse effects of dredge and fill discharge. The Regional Administrator can initiate the Section 404(c) process with nothing more than a finding that the activity *could* result in an unacceptable adverse effect. 40 C.F.R. § 231.3(a) (2010). Subsequent procedural steps require findings that the unacceptable adverse effect is *likely*, and, for the final prohibition, that there *will* be an unacceptable adverse effect. *Id.* § 231.5(a); 33 U.S.C. § 1344(c) (2006). The regulations therefore encourage a precautionary approach, accounting for an increase in information-gathering throughout the public process. In light of the environmental sensitivities and regulatory background of the Pebble controversy, initiation of Section 404(c) process is warranted on the CWA's statutory and regulatory authority alone.

B. Policy Overcomes Concerns about the Reach of EPA Authority

Initiating public process under Section 404(c) is also supported by general principles of environmental protection and state and local interests. These policy-based justifications for initiating Section 404(c) process address concerns raised by the State of Alaska *See generally* Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r (Sept. 21, 2010) (on file with author) and its congressional delegation. *See generally* Letter from Lisa Murkowski, U.S. Senator, to Lisa P. Jackson, U.S. EPA

Adm'r; *see also* H.R. 5992, 111th Cong. (2nd Sess. 2010) (proposing the removal of Section 404(c) from the CWA).

The precautionary principle, for example, supports the use of public process under Section 404(c) to evaluate potential unacceptable environmental impacts from the dredging and filling activities associated with the proposed Pebble development. The precautionary principle "calls for action to protect the environment to precede certainty of harm," HOLLY DOREMUS, ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 305 (5th ed. 2008) and is written into the regulatory and statutory language that guides Section 404(c) process by allowing for variable probabilities of harm at the different steps of the process. *See, e.g.,* 40 C.F.R. § 231.3(a) (2010); *see also* 33 U.S.C. § 1344(c) (2006). To initiate the public process, the Regional Administrator needs only to find that an unacceptable adverse effect *could result* from the activity, whereas the prohibition itself requires the EPA to determine that the activity *will have* an adverse effect. 40 C.F.R. § 231.3(a) (2010); 33 U.S.C. § 1344(c) (2006). Both the precautionary principle and the regulatory and statutory language therefore militate in favor of an initiating the Section 404(c) process early and before permitting.

Alaska Governor Sean Parnell wrote to the EPA urging the Agency to withhold process under Section 404(c); however, the governor's arguments are without merit. Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 254, at 1. The governor argued that initiating Section 404(c) process for the Pebble prospect would be premature because PLP has not yet submitted applications and the NEPA process has not yet produced sufficient studies to support reasoned decision-making by the EPA. *See id.* at 2. The governor's argument ignores the precautionary value of the Section 404(c) process, which allows the Regional Administrator to act on the mere chance of unacceptable adverse effects and to begin gathering information through the public process. *See* 40 C.F.R. § 231.3(a) (2010). Furthermore, engaging in the Section 404(c) process prior to receiving permit applications is fully anticipated by the EPA's regulations which provide that "[t]he Administrator may prohibit the specification of a site . . . *before* a permit application has been submitted to or approved by the Corps or a state." *See id.* § 231.1(a) (2010) (emphasis added). Governor Parnell's assertion that the "intended purpose" of Section 404(c) is a "backstop" to address actual or imminent adverse effects' *Id.*, misinterprets Section 404(c) and its implementing regulations.

Governor Parnell also asserts that a Section 404(c) determination impinges on state land planning authority and "short change[s]" public participation. Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r, at 1-3. Section 404, however, only concerns federal jurisdiction over waters that could be used for interstate or foreign recreation or to harvest fish or shellfish for interstate or foreign commerce. 40 C.F.R. § 122.2 (2010). Although this may limit the use of state land to activities that do not harm waters that fall under the jurisdictional scope of the CWA, the EPA's authority to oversee the protection of those waters is well within the federal government's interstate commerce authority. *See* Rapanos v. United States, 547 U.S. 715, 739 (2006)

(explaining that the Army Corps' Section 404 jurisdiction includes "relatively permanent, standing or continuously flowing bodies of water,"); U.S. CONST. art. I, § 8, cl 3. In addition, while a Section 404(c) prohibition may limit the use of state land, the EPA's decision must be based upon the environmental impacts of dredge and fill activities, not based on "other reasons completely divorced from the statutory text." *See* Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 606 F. Supp. 2d 121, 126, 140 (D.D.C. 2009), *appeal dismissed per stipulation*, No. 09-5201, 2009 WL 2251896, at *1 (D.C. Cir. July 1, 2009).

Further, Governor Parnell claims that the Section 404(c) process would "short change public participation", Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 254, at 2, by claiming that, although Section 404(c) encompasses an opportunity for public comment and a hearing, it would not be as democratically involved as the state permitting and NEPA processes. *See* Id. Again, the governor's argument is not supported by the facts. The Section 404(c) process includes not only a notice and comment period but also the opportunity for a rigorous public hearing. *Compare* 40 C.F.R. § 231.4 (2010) (requiring, during Section 404(c) process, consideration of public comments by the Regional Administrator; allowing the Regional Administrator to conduct public hearings "in the vicinity of the affected site"; and enabling any person at the hearing to be represented by counsel, to "submit oral or written statements and data," and to have "an opportunity for rebuttal"), *with* 40 C.F.R. § 1506.6 (2010) (outlining public involvement for NEPA process; requiring public hearings "whenever appropriate or in accordance with statutory requirements," but not calling for the same degree of public involvement as 40 C.F.R. § 231.4). [back] In addition, the EPA Administrator's final determination is made in consultation with the Army Corps, the landowner, and, if initiated after applications are filed, the applicant. 40 C.F.R. § 231.6 (2010). The Section 404(c) process encompasses the inherently democratic principles of full public participation.

The controversy surrounding the possible use of Section 404(c) process at the Pebble prospect has also elicited hostility from Alaska's congressional delegation. In a letter to EPA Administrator Lisa Jackson, Senator Lisa Murkowski cautioned the EPA that the recent prohibition at Spruce Mine No. 1 in West Virginia and the possible prohibition at the Pebble prospect are unprecedented. Letter from Lisa Murkowski, U.S. Senator, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 181. Senator Murkowski warned the agency that "failure to adhere to the intent of the legislature" may lead to "actions taken to clarify that intent," and that the continued existence of the agency's authority is dependent upon "justifiable and measured usage." *Id.* In a more forward attempt to "clarify that intent," Congressman Don Young has submitted a bill that would completely eliminate Section 404(c) from the CWA. H.R. 5992, 111th Cong. (2nd Sess. 2010). Another bill, sponsored by Representatives John Mica and Nick Rahall of Florida and West Virginia, respectively, would invalidate Section 404(c) restriction and prohibition determinations unless the "State in which the discharge originates or will originate . . . concur[s] with the Administrator's determination . . . ." H.R. 2018, 112th Cong. (1st Sess. 2011).

Despite consideration of the congresspersons concerns, the EPA should initiate public process under Section 404(c) at the Pebble prospect. Moreover, because Section 404(c) provides a powerful tool for the EPA to oversee possibly inadequate state and Army Corps permitting processes, providing a second check to prevent unacceptable adverse impacts to aquatic and wetland environments, Congress would be unwise to strike Section 404(c) from the CWA. *See* H.R. 5992, 111th Cong. (2nd Sess. 2010). In fact, Congressman Young's bill would limit the EPA's ability to protect "important remnant[s]" YAZOO PUMPS RECOMMENDED DETERMINATION, *supra* note 203, at 68 of unique aquatic environments and the recreational, commercial, and subsistence lifestyles that they fuel. By initiating Section 404(c) process for the proposed development of the Pebble Mine at the headwaters of Bristol Bay, the EPA can exemplify the utility and necessity of Section 404(c) for the fulfillment of the CWA's mission to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006).

VIII. Conclusion

The EPA should grant the petition originally submitted by the six federally recognized tribes and initiate public process under Section 404(c). By initiating the Section 404(c) process, the EPA can help protect the Bristol Bay watershed and the ecological, recreational, cultural, and commercial interests that it supports. The CWA and its implementing regulations reinforce a proactive, precautionary approach to the use of Section 404(c) public process. In light of the inadequate Bristol Bay Area Plan and its impacts on both the EIS process and the Army Corps' permitting determinations, if the EPA withholds Section 404(c) public process the EPA would likely be abusing its discretion and could arguably be abdicating its duty to oversee the Army Corps' permitting. By initiating Section 404(c) process the EPA will fulfill the CWA's oversight obligations while conforming to statutory and regulatory language, judicial precedent, and past agency action, all of which emphasize the precautionary principle and protecting upriver environments, and recognize the importance of recreational and subsistence interests. The EPA should use Section 404(c) and take a step towards protecting the integrity of the Bristol Bay watershed.

Please contact me at (907)299-8821 or waterlaw@uci.net if you have any questions regarding these comments. Thank you.

Sincerely,

s/*Harold Shepherd*
Harold Shepherd, President